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No. 94-580

In the Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL KOEHLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly applied Sentencing Guidelines § 2B1.2(b)(4)(A) (Nov. 1992), which provides a four-level increase to the base offense level for offenses involving stolen property "[i]f the offense was committed by a person in the business of receiving and selling stolen property."

2. Whether the district court erred by failing to conduct on its own initiative an on-the-record inquiry into the fitness of petitioner's court-appointed counsel, who was arrested for possession of cocaine six weeks before petitioner's trial.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970)	10
Braxton v. *United States*, 500 U.S. 344 (1991)	7, 8
Burger v. *Kemp*, 483 U.S. 776 (1987)	10
Cuyler v. *Sullivan*, 446 U.S. 335 (1980)	9, 10
Goodman v. *Lukens Steel Co.*, 482 U.S. 656 (1987)	6
Holloway v. *Arkansas*, 435 U.S. 475 (1978)	10
Mannhalt v. *Reed*, 847 F.2d 576 (9th Cir.), cert. denied, 488 U.S. 908 (1988)	9
Strickland v. *Washington*, 466 U.S. 668 (1984)	9, 10
Taylor v. *United States*, 985 F.2d 844 (6th Cir. 1993)	9
United States v. *Esquivel*, 919 F.2d 957 (5th Cir. 1990)	7
United States v. *King*, 21 F.3d 1302 (3d Cir. 1994)	7
United States v. *Rosa*, 17 F.2d 1531 (2d Cir.), cert. denied, 115 S. Ct. 211 (1994)	6
United States v. *Russell*, 913 F.2d 1288 (8th Cir. 1990), cert. denied, 500 U.S. 906 (1991)	6
United States v. *St. Cyr*, 977 F.2d 698 (1st Cir. 1992)	7
United States v. *Warshawsky*, 20 F.3d 204 (6th Cir. 1994)	5, 7
Winkler v. *Keane*, 7 F.3d 304 (2d Cir. 1993), cert. denied, 114 S. Ct. 1407 (1994)	9

Constitition, statutes and rules:

U.S. Const. Amend. VI	10
18 U.S.C. 371	2

Statutes and rules: Page

18 U.S.C. 2314 2
18 U.S.C. 2320 2
18 U.S.C. 2320(d)(2) 5
28 U.S.C. 994(*o*) 7
Fed. R. Crim. P. 33 ..... 3, 4, 8
Sentencing Guidelines (Nov. 1992):
§ 2B1.1 7
§ 2B1.1(b)(1)(L) 3
§ 2B1.2 3
§ 2B1.2(b)(1) 3
§ 2B1.2(b)(4)(A) 3, 4, 5
§ 2X1.1 3
§ 2X1.1(b)(2) 4

Miscellaneous:

United States Sentencing Comm'n, *Guidelines Manual* (Nov. 1993) 8

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 24 F.3d 867.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1994. A petition for rehearing was denied on July 1, 1994. Pet. App. 10a. The petition for a writ of certiorari was filed on September 29, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on one count of conspiracy to transport

stolen automobile parts in interstate commerce and to use a counterfeit mark to traffic in goods, in violation of 18 U.S.C. 371, 2314, and 2320; and two counts of knowingly using a counterfeit mark to traffic in goods, in violation of 18 U.S.C. 2320. He was sentenced to 24 months' imprisonment, to be followed by two years of supervised release. The court of appeals affirmed. Pet. App. 1a-9a.

1. Petitioner operated a wholesale automobile parts business based in Lake Mohegan, New York. FBI Agent Ronald Watson, posing as an auto parts broker, contacted petitioner concerning parts that petitioner had advertised for sale. In subsequent conversations with Watson, petitioner indicated that he operated an extensive business in stolen and counterfeit automobile parts. Their conversations resulted in four transactions: Watson purchased 52 stolen car axles from petitioner for $3,380; Watson sold petitioner a load of spark plugs, which Watson represented as stolen, for $20,550; Watson sold petitioner 89 reconditioned air conditioner compressors bearing counterfeit labels for $2,670; and petitioner gave Watson 107 counterfeit labels and 100 counterfeit boxes to induce Watson to provide additional air conditioner compressors. See Pet. App. 2a; Gov't C.A. Br. 5-13.

2. On July 30, 1992, a federal grand jury returned an indictment against petitioner based on those transactions. The district court appointed Stevens J. Jacobs as counsel for petitioner. On November 20, 1992, state authorities arrested Jacobs for possession of cocaine. Jacobs informed the district judge of the arrest, noting that he had discussed the matter with petitioner (who was present in court) and that petitioner had not wanted Jacobs to disclose the arrest to the court. The judge granted a continuance in petitioner's case and allowed

Jacobs to participate in an in-patient drug treatment program. Petitioner later signed a disclosure statement declaring that he was aware of the charge against Jacobs and that he wished to continue to utilize Jacobs as his counsel. On February 8, 1993, petitioner's trial commenced before a different district judge, and ten days later petitioner was convicted on all counts charged in the indictment. At no time before or during the trial did petitioner voice any concerns about his attorney's arrest or representation. Pet. App. 3a; Gov't C.A. Br. 2-3.

3. Following his conviction, petitioner obtained new counsel, who filed a motion for a new trial pursuant to Fed. R. Crim. P. 33. Petitioner's new attorney contended that petitioner had received ineffective assistance of counsel at trial because of his attorney's drug use and arrest. Pet. App. 3a-4a. The district judge denied the motion, stating that Jacobs' "performance was not deficient. I personally watched him. I think that there was an adequate development of the evidence. The adversarial system was not compromised. [Jacobs] offered the best defenses that he had available to him." 5/12/93 Tr. 16. Petitioner filed a second motion for a new trial, which was also denied. See Pet. App. 4a.

At sentencing, the district court determined that petitioner's base offense level was four. See Sentencing Guidelines §§ 2B1.2, 2X1.1 (Nov. 1992). The court then adjusted the base offense level to take account of the specific offense characteristics. The court imposed an eleven-level increase, because the retail value of the auto parts involved in this case exceeded $350,000. See Guidelines §§ 2B1.1(b)(1)(L), 2B1.2(b)(1) (Nov. 1992). The court imposed an additional four-level increase, because petitioner was "in the business of receiving and selling stolen property." Guidelines § 2B1.2(b)(4)(A) (Nov. 1992). The court granted a three-level reduction, because

petitioner had not completed all the acts necessary to achieve the objects of the conspiracy. See Guidelines § 2X1.1(b)(2) (Nov. 1992). Those adjustments yielded a total offense level of 16. That offense level, combined with petitioner's Criminal History Category of I, yielded a sentence range of 21 to 27 months' imprisonment. See Pet. App. 4a; 7/29/93 Tr. 14.

4. On appeal, petitioner argued that the district court erred by failing to undertake a pre-trial inquiry into whether his assigned counsel was able to conduct a competent defense and into whether petitioner wished to continue being represented by an attorney who had been arrested on drug charges. The court of appeals concluded that the argument was procedurally barred, because petitioner first raised the issue in an untimely Rule 33 motion for a new trial. The court also rejected the argument on the merits, concluding that: (a) petitioner was aware before trial of his attorney's arrest and of the possibility of obtaining a continuance to obtain new counsel; (b) there was no indication before trial that the attorney's arrest would create a conflict of interest with petitioner, because their cases were factually unrelated and were being prosecuted by different sovereigns; and (c) petitioner had received effective assistance of counsel. Pet. App. 4a-6a.

Petitioner also challenged the district court's calculation of his sentence. Petitioner contended that the stolen-property transactions that led to his conviction were isolated incidents insufficient to support imposition of the "in the business" offense level adjustment set out in Guidelines § 2B1.2(b)(4)(A) (Nov. 1992). The court of appeals rejected that argument. The court ruled that those transactions, taken in the context of petitioner's tape-recorded statements to Watson, indicated that petitioner "operated a sophisticated ongoing business

dealing in stolen automobile parts" that justified the adjustment. Pet. App. 8a-9a (citing *United States* v. *Warshawsky*, 20 F.3d 204, 215 (6th Cir. 1994)).[1]

ARGUMENT

1. Petitioner renews his contention (Pet. 4-6) that the district court erroneously applied Guidelines § 2B1.2(b)(4)(A) (Nov. 1992), which provides a four-level adjustment to the base offense level for offenses involving stolen property if the offense was committed "by a person in the business of receiving and selling stolen property." Petitioner argues that the stolen property transactions that the government proved at trial were insufficient to warrant imposition of the "in the business" adjustment. The court of appeals correctly rejected that contention, and its decision does not conflict with the decision of any other courts of appeals.

The district court's offense level adjustment in this case is amply supported by the evidence. As the court of appeals explained (Pet. App. 9a), the government showed that petitioner had engaged in multiple stolen-property transactions and that he had made numerous admissions concerning his knowledge and ongoing involvement in a

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[1] Petitioner also challenged the sufficiency of the government's evidence to support one of the counts of conviction. The court of appeals rejected petitioner's contention that the evidence was insufficient to show that he had transferred the counterfeit labels and boxes "as consideration for anything of value." See 18 U.S.C. 2320(d)(2). Pet. App. 7a-8a. Petitioner does not challenge that ruling here.

stolen auto parts business.[2] Petitioner's conversations with Watson demonstrate that the stolen-property transactions were not isolated incidents, but were part of his continuing business. The courts below agreed that the evidence was sufficient to establish that petitioner was "in the business," and there is no warrant for this Court to reconsider that matter. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987).[3]

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[2] For example, petitioner advised Watson during their first telephone conversation that he could move parts "nice and quietly" and did not sell to dealers so as to avoid "flack." See Gov't C.A. Br. 36. During subsequent conversations, petitioner displayed eagerness to obtain additional stolen goods. He expressed an interest when Watson told him that he had a contact who could obtain parts stolen from an auto plant, and petitioner later told Watson to "stay on top of" his source in case additional stolen parts became available. *Id.* at 9-10, 35. Petitioner saw a sample of one of these stolen parts on Watson's desk and told Watson that, depending on the price and quantities available, he would be interested in purchasing a number of them. *Id.* at 36. Petitioner's statements also demonstrated considerable expertise and experience in the stolen parts market. He conversed with Watson about such topics as the need to take precautions to avoid discovery and the advantages of stealing parts from scrap yards. *Id.* at 7-8.

[3] Other courts of appeals have reached comparable conclusions based on similar evidentiary records. See *United States* v. *Rosa*, 17 F.3d 1531, 1551-1552 (2d Cir.) ("Rosa also revealed familiarity with the need to resell goods that bore serial numbers outside of New York * * *. Further, numerous recorded conversations demonstrated that Rosa was willing to deal in a broad variety of stolen goods for resale * * *. The court could reasonably infer from this evidence that [the defendants] were 'in the business' of reselling stolen goods."), cert. denied, 115 S. Ct. 211 (1994); *United States* v. *Russell*, 913 F.2d 1288, 1294 (8th Cir. 1990) (evidence that defendant had told an informant that he could supply stolen goods "could reasonably lead the district court to conclude that

Petitioner contends that the Sixth Circuit's decisions in this case and in *United States* v. *Warshawsky*, 20 F.3d 204 (1994), conflict with the First Circuit's decision in *United States* v. *St. Cyr*, 977 F.2d 698 (1992), and the Third Circuit's decision in *United States* v. *King*, 21 F.3d 1302 (1994). According to petitioner, the First and Third Circuits apply a "nuanced multi-factored analysis" (Pet. 4), while the Sixth Circuit "seized upon only a single factor—whether the defendant himself stole the property he later sold—to determine the applicability of the enhancement" (Pet. 5). Petitioner's characterization of the Sixth Circuit's decision is debatable, but in any event the outcome in this case would be the same under any of the cases petitioner cites. The evidence here—which showed that petitioner "operated a sophisticated ongoing business dealing in stolen automobile parts" (Pet. App. 9a)—is sufficient to satisfy the First and Third Circuit's "totality of the circumstances" test. See *King*, 21 F.3d at 1306-1308; *St. Cyr*, 977 F.2d at 703; see also *Warshawsky*, 20 F.3d at 215; *United States* v. *Esquivel*, 919 F.2d 957 (5th Cir. 1990).

Moreover, even if this case presented a square conflict among the courts of appeals, there would be no warrant for the Court to review the matter. As this Court observed in *Braxton* v. *United States*, 500 U.S. 344, 348-349 (1991), the Sentencing Commission has a statutory duty "periodically [to] review and revise" the Guidelines, 28 U.S.C. 994(*o*), and is responsible for "mak[ing] whatever clarifying revisions to the Guidelines conflict-

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[defendant] was in the business of selling stolen property"), cert. denied, 500 U.S. 906 (1991).

ing judicial decisions might suggest." *Braxton*, 500 U.S. at 348.[4]

2. Petitioner also contends (Pet. 7-13) that the district court erred in failing to conduct *sua sponte* a pre-trial inquiry into whether his assigned counsel was fit to conduct a competent defense and whether petitioner wished to continue being represented by him. Petitioner does not appear to contest the court of appeals' conclusion that his challenge was procedurally barred because petitioner first raised it through an untimely Rule 33 motion for a new trial. See Pet. App. 4a-5a. In any event, the court of appeals correctly rejected petitioner's argument on the merits.

The record in this case demonstrates that petitioner had no qualms with his trial counsel's representation until after his conviction. Petitioner concedes that he was aware of his attorney's arrest before trial. Pet. 7. He did not dispute Jacobs' statement in open court that Jacobs had discussed the drug issue with petitioner. See 11/23/92 Tr. 2, 5-6. Petitioner signed a disclosure statement before trial stating that petitioner was aware of the charge against Jacobs and that he did not wish Jacobs to discontinue acting as petitioner's counsel. Pet. App. 3a. Petitioner made no objection to Jacobs' representation until April 26, 1993, more than two months after the jury returned its verdict. *Id.* at 4a-5a.

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[4] Since the district court's decision in this case, the Sentencing Commission has recodified the "in the business" offense level adjustment by consolidating it with Guidelines § 2B1.1 and revising the background commentary. See United States Sentencing Comm'n, *Guidelines Manual*, App. C, at 303-304 (Nov. 1993) (amend. 481, eff. Nov. 1, 1993). Those changes may resolve any tension that might exist among the lower courts concerning application of the "in the business" adjustment.

The record also demonstrates that petitioner received adequate representation. The court of appeals properly concluded that "there was no indication that [Jacobs'] drug arrest would create a conflict of interest between Koehler and [his] attorney." Pet. App. 6a.[5] Furthermore, the courts below both concluded that petitioner had received effective assistance of counsel at trial. *Ibid.*[6]

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[5] This is not a case in which defense counsel was implicated in the very crimes alleged against his client, which presents the risk that "a vigorous defense might uncover evidence of the attorney's own crimes, and the attorney could not give unbiased advice to his client about whether to testify or whether to accept a guilty plea." *Mannhalt* v. *Reed*, 847 F.2d 576, 581 (9th Cir.), cert. denied, 488 U.S. 908 (1988). Nor is this a case in which the same authorities prosecuted both defense counsel and his client, so that counsel could conceivably compromise representation of his client to obtain favorable treatment in his own case. *Taylor* v. *United States*, 985 F.2d 844, 846 (6th Cir. 1993) (per curiam). Rather, Jacobs' crime was factually unrelated and was prosecuted from the outset exclusively by state authorities. Accordingly, there is no basis in the record for concluding that petitioner and Jacobs had divergent interests "with respect to a[ny] material factual or legal issue or to a course of action." *Winkler* v. *Keane*, 7 F.3d 304, 307 (2d Cir. 1993) (quoting *Cuyler* v. *Sullivan*, 446 U.S. 335, 356 n.3 (1980)), cert. denied, 114 S. Ct. 1407 (1994).

[6] Petitioner bases his ineffective assistance contention on five claims of attorney error. See Pet. 11 n. * * *. He raised only one of those claims—concerning Jacobs' failure to request an instruction that a defendant could not conspire with a government agent—before the district court. Gov't C.A. Br. 26; see Mot. for New Trial 2-4 (Apr. 26, 1993); Renewed Mot. for New Trial July 1-2 (July 22, 1993). The district court evaluated that claim under the test set forth in *Strickland* v. *Washington*, 466 U.S. 668, 688, 694 (1984), and rejected it, finding that petitioner "has failed to prove either of the elements necessary to find ineffective assistance of counsel." Op. and Order Deny. Renewed Mot. for New Trial 4 (July 29, 1993). By failing to raise the other four claims in the district court, petitioner has failed to preserve them

This Court has recognized that the district courts and the courts of appeals have primary responsibility for resolving claims of ineffective representation. See *Burger* v. *Kemp*, 483 U.S. 776, 785 (1987). When those courts have found that trial counsel has performed his or her duties competently, this Court is properly reluctant to "substitut[e] speculation for their considered opinions." *Ibid.*

There is no merit in petitioner's suggestion (Pet. 11-12) that this Court should impose a per se requirement that lower courts conduct an on-the-record inquiry into the fitness of counsel whenever those courts learn that court-appointed counsel has been implicated in a felony. The lower courts are capable of dealing with the unusual situation presented here on a case-by-case basis. The per se rule proposed by petitioner would add little to the Sixth Amendment protections that defendants currently enjoy. See, *e.g.*, *Strickland* v. *Washington*, 466 U.S. 668 (1984); *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980); *Holloway* v. *Arkansas*, 435 U.S. 475 (1978). At the same time, it would require reversal in cases, such as this one, in which the courts below concluded that the defendant received adequate assistance of counsel. As petitioner concedes, the duty he seeks to impose on the courts presents "an issue of apparent first impression and thus has not generated any conflict among the circuit courts of appeal." Pet. 12. There is no reason for the Court to address the issue at this time.

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for review. See, *e.g.*, *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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